

DOCUMENT RESUME

ED 424 816

HE 031 670

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TITLE Academic Freedom without Tenure? New Pathways: Faculty Career and Employment for the 21st Century Working Paper Series, Inquiry #5.
INSTITUTION American Association for the Advancement of Science, Washington, DC.
PUB DATE 1997-00-00
NOTE 24p.; For related documents, see HE 031 666-678.
AVAILABLE FROM American Association for Higher Education, One Dupont Circle, Suite 360, Washington, DC 20036-1110; phone: 202-293-6440, ext. 11; fax: 202-293-0073 (\$8.50 members, \$10 nonmembers; subscription to all 14 papers: \$120 members, \$140 nonmembers).
PUB TYPE Opinion Papers (120) -- Reports - Descriptive (141)
EDRS PRICE EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Academic Freedom; College Environment; *College Faculty; Contracts; Educational Environment; *Faculty College Relationship; Higher Education; Intellectual Freedom; Legal Responsibility; Nontenured Faculty; *Peer Evaluation; Personnel Policy; Professional Autonomy; Teaching Conditions; *Tenured Faculty

ABSTRACT

This paper, one in a series about the priorities of the professoriate, seeks to clarify the relationship between academic freedom and tenure by examining the standards and procedures used by the university to protect academic freedom without a tenure system. The paper considers first the minimum elements necessary to protect academic freedom absent a tenure system; next, it examines whether grievance procedures adequately protect the values of academic freedom, suggesting that additional measures might be necessary to safeguard academic freedom. Sections of the paper discuss the rules and procedures used to protect academic freedom, noting that it is the institution's responsibility to define what it believes constitutes academic freedom and that members of the university community have a vital vested interest in protecting their academic freedom. The paper notes the various structural devices (contracts, evaluations, peer review) which protect academic freedom and examines how well they protect academic freedom absent a tenure system. The paper concludes that colleges and universities that do not maintain tenure systems can adopt procedures that provide legal and practical academic freedom for their faculty, but is concerned that the loss of peer review in faculty evaluation may alter some of the subtle aspects of academic freedom. (Contains 13 references.) (CH)

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Academic Freedom Without Tenure?

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The Forum on Faculty Roles & Rewards is a special program of the American Association for Higher Education (AAHE). It works with faculty leaders, senior academic administrators, trustees, legislators, and others interested in refocusing faculty priorities to address pressing institutional and societal needs.

To advance this agenda, AAHE initiated a project called "New Pathways: Faculty Careers and Employment for the 21st Century." The New Pathways Working Paper Series addresses key issues related to changing faculty careers and employment arrangements; the series consists of 14 papers to be released during 1996-1997.

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FOREWORD

In 1992, AAHE entered into the growing national debate about the priorities of the professoriate by establishing the Forum on Faculty Roles & Rewards — a program that sponsors an annual national conference, issues publications, and serves as a general clearinghouse. Thus, when tenure surfaced in the spring of 1994 as a major issue of conversation and media attention, we became an interested party in the discussion.

On reflection, we decided that what was needed was not another familiar debate about the pros and cons of tenure but a new dialogue — a dialogue in which tenure was placed in a larger context of fresh thinking about two questions: What career paths make sense for the professoriate of the 21st century? What varieties of employment arrangements might most appropriately undergird these paths?

We also concluded that what might best help campuses work through these questions was not more philosophical argument but concrete options: practical ideas about new career paths and imaginative employment arrangements that campuses could try on for size.

AAHE's New Pathways project seeks to carry out that agenda. Project activities include (1) sponsoring forums to advance the dialogue; (2) serving as a general clearinghouse; and (3) initiating investigations into selected, particular issues.

Central direction for the project is provided by a three-person team: R. Eugene Rice, director of AAHE's Forum on Faculty Roles & Rewards; Richard Chait, professor of higher education, Harvard Graduate School of Education; and Judith Gappa, professor and vice president for human relations at Purdue University. Richard Chait's part of the project, which focuses on creative employment arrangements, is supported by a generous grant from the Pew Charitable Trusts.

The project team in turn benefits from the wise counsel of a four-person national advisory panel: Richard Lyman, president emeritus, Stanford University (chair); Andrew Hurwitz, attorney; Ejner Jensen, professor of English and special counsel to the president, University of Michigan; and Linda Wilson, president, Radcliffe College.

We wanted to make our own investigations quickly available in a form that was affordable, easily duplicated, and suggestive of what they really are: works in progress, intended to stimulate and enrich further discussion.

Russell Edgerton

President, American Association for Higher Education

Academic Freedom Without Tenure?

by J. Peter Byrne

The question of whether academic freedom can be protected effectively without tenure arises periodically — often when contracting resources or changing aspirations increase the pain with which tales of lazy, obsolete, or abusive tenured professors are retold. Some observers wonder whether the benefits of an intellectually independent professoriate can be secured without granting a promise of life employment. Others believe that tenure reflects a contractual term that effectively encourages the academic *ex ante* to undertake the costly process of specialization necessary to publish and teach successfully in the modern university (McPherson and Winston 1993: 109). Does tenure freeze out new talent by entrenching the old, or does it encourage established professors to hire the bright and promising by eliminating any threat that these new aspirants will replace them?

In this paper, I do not intend to examine the plausibility or weight of the utility-based arguments for or against tenure. Tenure most frequently and plausibly has been defended as a protection of academic freedom, a bedrock value of the organized scholarly community.¹ But is tenure really necessary to fully protect academic freedom? The two concepts seem conceptually distinct. *Academic freedom* denotes the right of a faculty member to research, publish, and teach, subject to evaluation only by professional, educational criteria and free from politically motivated institutional or civil sanction. *Tenure* means the right of an academic, after a probationary period and a rigorous evaluation by professional peers, to retain his or her post continuously until retirement, unless the institution can demonstrate “just cause” for dismissal following fair and extensive procedures. Faculty without tenure enjoy the same right to academic freedom, although in practice they are more vulnerable than those with tenure.

This paper seeks to clarify the relation between academic freedom and tenure by examining the standards and procedures a university should follow to protect academic freedom in the absence of the broader promise tenure makes — that the professor will not be dismissed. Although my principal purpose is to question the relation between academic freedom and tenure, I also suggest how to

¹ A careful and fair argument for the essential relation between the two is found in Brown and Kurland 1990.

enhance the academic freedom of the growing number of faculty who never will enjoy tenure.

To evaluate any effect the absence of tenure has on academic freedom, it's necessary first to posit the purposes served by tenure's elimination. There are two chief reasons not obviously related to academic freedom. One, schools might want to more easily replace professors who are performing below standard. Although even tenured professors may be dismissed for incompetence, they will not be fired for lackluster performance unless it falls to a most egregious level. A school might believe that in today's market it can hire someone better or equally good at a lower salary, but tenure prevents the school from acting on its belief. This effect can be magnified when a school wants to improve a subpar department.

Two, the institution might want to increase or decrease faculty in certain subject matter areas — in response to a change in institutional goals or to changes in the education market, making it easier

to follow shifts in student demand for particular courses of study or in the granting policies of government or foundations. Thus, the school seeks the kind of labor flexibility enjoyed, at least in theory, by business managers. Leaving aside whether a university that operated on such principles would be successful or attractive, such a school would not in principle lack academic freedom. The problem is that abuses would be easy to perpetrate and difficult to detect or remedy.

This essay, then, considers first the minimum elements necessary to protect academic freedom without a tenure system — elements such as those a competent university counsel might recommend. Not surprisingly, the legal instrument I propose resembles a grievance procedure, by providing an opportunity for a hearing before a panel to consider whether appropriate procedures and standards have been followed. Next, the essay examines whether that grievance procedure model adequately protects academic freedom values, and inquires about additional measures that might be necessary to more amply safeguard this freedom. An acceptable regime must afford faculty the type of intellectual freedom and degree of institutional muscle necessary to achieve the teaching and scholarly goals of higher education. This is a big issue that likely would be answered differently at different institutions. It requires weighing the purposes of higher education, the meaning of academic freedom, and the nature of authority in the university. Finally, the essay assesses where we have come, and asks whether procedures that protect such an enhanced understanding of academic freedom do so more efficiently than does the tenure system.

BUT IS TENURE
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FREEDOM?

PROTECTING ACADEMIC FREEDOM THROUGH RULES AND PROCEDURES

What legal requirements are necessary to protect the academic freedom of faculty at an institution that does not confer tenure? Let's imagine a college that has decided against tenure but wishes to adopt internal rules that give substance to its sincere desire that faculty feel free to research, publish, and teach.

Professors at *private* institutions have no legally enforceable right to academic freedom at all, unless such a right can be plausibly inferred from the professors' employment contracts (Kaplin and Lee 1995: 300). Indeed, private colleges and universities more typically explicitly guarantee tenure through an employment contract than guarantee academic freedom. Although a school might find itself in legal trouble if it dismissed a professor during the term of his or her contract for espousing unpopular views (because termination would constitute breach of the contract, unless the contract empowered the university to so dismiss), the school would experience no legal problem for not renewing the contract at its term on the same basis. (In fact, the AAUP's 1958 "Statement on Procedural Standards in Faculty Dismissal Proceedings" treats identically dismissals of tenured professors and those of untenured professors before the expiration of their contract terms.)

In contrast, the First Amendment protects professors at state institutions against dismissals that violate their rights of free speech.² The Supreme Court has stated on numerous occasions that the First Amendment protects academic freedom.³ Yet, examination of the reported decisions should make us skeptical of whether federal court litigation provides real protection to academic freedom as a matter either of theory or of practice.⁴ Lawyers and judges frequently misunderstand academic freedom, which is a concept originating in academic practice and ethics rather than in the law. For example, they find it difficult to fit within the First Amendment, which prohibits virtually all penalizing of speakers by the state for the content of their speech, a norm that empowers government officials (i.e., other

² Only organs of the state, such as public institutions of higher education, are subject to Constitutional limitations. See *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

³ See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). *Sweezy* is the first reported decision enforcing any legal right to academic freedom.

⁴ I have examined this question at some length in Byrne 1989. A more optimistic view of the convergence of legal and academic understanding of academic freedom is given by Rabban 1990.

academics at state schools) to fire a professor precisely because they view his or her professional speech to be of low quality. The courts also interpret the First Amendment, correctly in my view, as protecting institutional academic decision making from political interference — a principle frequently in tension with judicial protection of professors from institutional penalties.⁵ Of course, professors do (rarely) prevail against universities on claims that employment actions against them violate the First Amendment, even if the relation between the rights so vindicated and academic freedom might be tenuous.⁶

Thus, an institution that wants to respect academic freedom should bind itself to do so through an explicit promise that it will not violate the academic freedom of its faculty. Institutions that make

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such promises generally do so in faculty handbooks that are incorporated by reference into employment contracts. The promise should cover all aspects of the employment relation, including any decision by the school not to reappoint the professor. In the absence of tenure, the decision not to reappoint becomes extremely sensitive and must be made only on appropriate professional grounds. This has been the traditional understanding of “academic freedom,” but it has been very hard to monitor.

The next step the institution ought to take might seem the simplest, but in practice it can be the most difficult and contentious: The school should define what it believes to constitute academic freedom. The greatest difficulty with this suggestion is that it assumes too determinate a content for this freedom. Academic freedom does have a widely supported core prohibition — that a faculty member ought not to be penalized professionally because of the political implications of her or his scholarship or teaching. But that core (which might itself be qualified) is surrounded by serious questions with which neither the academic community nor society at large has yet come to terms. Such questions include the extent to which a faculty member may be sanctioned for public speech critical of university policy or actions

⁵ “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.” See *Regents of the Univ. of Mich v. Ewing*, 474 U.S. 214, 226 n. 12 (1985).

⁶ For example, the court in *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), held that the university’s penalizing of a professor for publishing articles that it believed to be racist violated the professor’s First Amendment rights, without so much as mentioning the words “academic freedom.”

(Rabban 1994), or for "irresponsibly" advocating political opinions,⁷ or for addressing issues in class beyond (or less than) those designated by the institutional curriculum.⁸

The meaning of academic freedom has been elaborated most importantly by the policy documents and reports of the American Association of University Professors. And faculty handbooks often reference its standards and procedures. (The AAUP investigates and reports on serious allegations of violations of academic freedom and maintains a censure list. Although the AAUP provides important extra-legal support for academic freedom, it vigorously supports tenure as essential for academic freedom. The AAUP's experience and witness should give pause to anyone advocating replacements for tenure.) The AAUP's most authoritative definition of academic freedom is found in its 1940 "Statement of Principles on Academic Freedom and Tenure," endorsed by nearly every higher education organization. This Statement (clarified by later interpretive comments) emphasizes freedom to do research and publish, freedom to teach (subject to the requirement that the teacher not persistently intrude extraneous, controversial subject matter), and freedom of a citizen to pursue political goals outside the institution.

The actual language of the AAUP's 1940 definition of academic freedom unfortunately sounds dated and is subject to 1970 interpretive comments that cancel or redirect aspects of the main text. Thus, a college or university would be better off paraphrasing these three basic protections and declaring also that it intends its definition to be consistent with the 1940 Statement and its interpretive comments. (My impression is that most schools avoid the inevitable controversy surrounding paraphrasing, and simply declare that they guarantee academic freedom as defined in the 1940 Statement and subsequent interpretations.)

Few occasions have arisen in which to make these general principles more specific. Indeed, an incidental but important benefit of tenure has been to protect the intellectual liberty of the professor without needing to confront the conceptual boundaries of academic freedom: It has been so difficult to remove a tenured professor for "just cause" that administrators have rarely had the stomach for seeking to remove one for his or her speech. At the same time, dismissals of nontenured faculty that some might have thought to violate academic freedom have not put at risk the positions of tenured

⁷ See Van Alstyne 1975, p. 59. The First Amendment extensively protects such political speech by a professor at a public university without regard to academic freedom, but the explicit promise of academic freedom needs to do so at private schools.

⁸ See, e.g., *Carly v. Arizona Bd. of Regents*, 737 P.2d 1099 (Ariz. App. 1987).

senior faculty, and thus have not been felt to pose foundational challenges to the prevalence of academic freedom. Universities, to their credit, are extremely bad at finally resolving questions of disputed principle, so they have happily embraced the opportunity not to decide what precisely academic freedom protects.

A school that undertakes to respect academic freedom without the thick shield of tenure must state more explicitly what academic freedom means. Here, then, I offer a model definition for inclusion in a faculty handbook, its content based on the 1940 Statement and persuasive subsequent commentaries:

Academic freedom includes the following rights and duties:

1) Faculty members have the right to pursue chosen research topics and to present their professional views without the imposition or threat of institutional penalty for the political, religious, or ideological tendencies of their scholarship, but subject to fair professional evaluation by peers and appropriate institutional officers.

2) Faculty members have the right to teach without the imposition or threat of institutional penalty for the political, religious, or ideological tendencies of their work, subject to their duties to satisfy reasonable educational objectives and to respect the dignity of their students.

3) Faculty members may exercise the rights of citizens to speak on matters of public concern and to organize with others for political ends without the imposition or threat of institutional penalty, subject to their academic duty to clarify the distinction between advocacy and scholarship.

4) Faculty members have the right to express views on the educational policies and institutional priorities of their schools without the imposition or threat of institutional penalty, subject to duties to respect colleagues and to protect the school from external misunderstandings.

This model definition is based on several postulates about academic freedom, each of which properly should be elaborated and defended at much greater length than is appropriate here.⁹ First, the conduct of free research and scholarship advances knowledge and offers society a locus for intelligent, informed, and reasoned discourse. Second, lay people will tend to slight the value of academic work, at least in the short term, and will be tempted to sacrifice unpopular scholars who impair the lay pursuit of practical and immediate goals. Third, this tension in values between the academy and the wider society has been duplicated within the modern university, where, in general, lay trustees and

⁹ My most extensive effort is Byrne 1989.

administrative employees manage fiscal and operational concerns, and faculty control scholarly and many educational matters. The overarching principle was stated long ago by Chief Justice Warren: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."¹⁰

(This is not to say that, as a matter of fact, university administrators generally or always disrespect academic values, or that professors are not often petty and prejudiced. In other writing, I have emphasized the role of administrators in protecting academic values from external impairment (see Byrne 1989) and explored the duty of professors not to judge their peers on extraneous grounds (see Byrne 1993). But our tradition of academic freedom plausibly has relied on professors as those most likely, as professional peers, to be able to distinguish between scholarly evaluation and political retaliation.)

Having promised the faculty member academic freedom and defined the scope of that protection, the school has given the professor a legal right, based in contract, that she or he can pursue in court. But no institution (and very few faculty members) will want to leave to the courts the initial decision about whether a particular personnel decision violates academic freedom. Not only does such a course lead immediately to lawyers, cost, delay, and uncertainty; it also robs the institution of two precious privileges. First, the university should want to correct its own mistakes and protect the interests of its constituents without civil intervention or adverse publicity. And second, the school should embrace the opportunity to define for itself, through conscientious application of general standards to particular cases, what academic freedom means in that community. One need add only the lawyer's perception that a demonstrated record of having competently embraced these tasks will provide an additional argument against civil liability in very controversial cases.

Thus, both principle and prudence dictate that an institution provide a fair internal-appeals mechanism to challenge adverse personnel decisions on the ground that they violate the faculty member's academic freedom.¹¹ Although, the institution would have the final say on the elements of fair procedure, here are a few observations about the necessary and sufficient elements.

Colleges and universities as a matter of course employ "grievance procedures" for a familiar

¹⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

¹¹ The due process clause does not require that even a public institution offer an untenured faculty member a hearing for nonreappointment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). But once the institution specifies that the professor is entitled to a hearing, that promise usually will become part of the enforceable contract.

variety of complaints, such as discrimination or failure to follow internal procedures. Because any hearing panel might need both to decide disputed facts and to "make law," in the sense of applying general principles to particular questions, the discussion that follows assumes prior resolution of many generic questions of personnel and grievance procedures. For example, an important issue is whether the professor can obtain an official explanation for an adverse personnel action. This seems highly desirable, at least when the complainant requests it. (See AAUP's 1989 "Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments.") Such an explanation can provide either a satisfactory basis for concluding that the institution acted appropriately or a basis for showing pretext and, perhaps, making out the *prima facie* case. This issue arises as pressingly in discrimination cases as in academic freedom cases. (And the point reminds us that tenure makes harder the perpetration of many types of improperly motivated actions.)

First, a majority of the appeals panel should be professors; academic freedom embodies the values of the professoriate, and novel or uncertain applications of principle should express its self-understanding. Moreover, strong faculty participation helps preserve the principle that professional evaluation of an individual scholar be by his or her peers. The faculty on the panel need not be in the same discipline as the grievant, because they will review the propriety of an evaluation performed by others rather than themselves evaluate.

Second, the hearing procedure might make extensive use of the familiar legal devices of the *prima facie* case and shifting burdens of proof.¹² As an initial matter, the complaining professor properly can be required to show, through written submissions subject to written challenge by the institution, that his or her exercise of protected professional or political activities led to adverse reactions by the evaluators, and that reasonable suspicion exists that these adverse reactions played a role in the evaluation decision. If the complainant can show this much — i.e., has made out a *prima facie* case — the complainant will have demonstrated that the academic freedom complaint is serious and that a more intensive inquiry is warranted. In a healthy school, the great majority of complaints most likely will be dismissed at this point, because the complainant's concerns have nothing to do with academic freedom or because the facts alleged are implausible.

Should the complainant prove a *prima facie* complaint, the burden of proof should shift to the institution to prove that institutional hostility to the complainant's protected activity played no

¹² The shifting of the burden of proof is most familiar in employment discrimination cases. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

substantial role in the adverse personnel decision. At this stage, it is ordinarily appropriate to conduct an oral hearing to permit witnesses to be questioned by both sides. This placing of the burden of proof on the institution after the complainant carries his or her initial complaint is crucial to give credibility to any procedure professing to protect academic freedom in the absence of tenure. The complainant will always be at a disadvantage in terms of resources and expertise in making out a claim; if the complainant succeeds in showing that a serious question of the violation of academic freedom exists, it is both just and efficient to require the institution to carry the burden of showing that a violation has not taken place. After all, an institution would have to carry the burden of proof on all aspects of the justness of its decision to terminate a tenured faculty member. (In First Amendment cases in court, institutions must carry a burden of proof after the complainant makes out a *prima facie* case, although the substantive standard is more generous to the institution.¹³) All members of the university community have a vital interest in protecting academic freedom. Moreover, placing this burden on institutions makes it easier to justify excluding lawyers from the appeals hearing, an exclusion helpful in limiting the costs and adversarial nature of inquiries and preserving the distinctly academic quality of the eventual decision.¹⁴

An intriguing possibility is to provide further for arbitration of still-disputed claims after the appeal has been completed. Requiring arbitration has the advantages of avoiding litigation and placing the elaboration of the meaning of academic freedom in the hands of trusted academic experts rather than in the court's. A body of arbitrators, supervised by the AAUP or other higher education organization, could develop over time a large body of useful principles. The idea isn't problem free, however: Arbitration might not eliminate having to resort to the courts in some cases, and institutions would lose local control over sensitive issues. Yet, academic freedom seems in its essence to be more a universal than a local value. Institutional

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¹³ *Doyle v. Mt. Healthy City Sch. Dist.*, 429 U.S. 274 (1977). *Doyle* requires only that the institution show that it would have made the same decision even if it had not wanted to punish the teacher for his speech, thus permitting the presence of hostility to the teacher's speech as a confirming factor. It likely is appropriate that federal law subjects institutions to a less stringent standard than the standard to which schools subject themselves, given that federal court decrees represent an intrusion, however justified in appropriate cases, into the autonomy of schools. (See Byrne 1989.)

¹⁴ See *Frumkin v. Bd. of Trustees, Kent St. Univ.*, 626 F.2d 19 (6th Cir. 1980).

commitment to arbitration would have to be voluntary and could be qualified by specific contractual exemptions. If tenure were to recede, arbitration of academic freedom cases would deserve very serious further study.

What we have considered so far treats the violation of academic freedom as a distinct wrong that can be detected and remedied through open and impartial procedure, just as, for example, age discrimination might be. Adoption and conscientious application of these standards and procedures should deter or redress egregious violations. And administrative costs should be reasonable, given that the complainant must make out a *prima facie* case before seriously expensive procedures are deployed. An institution that cares about academic freedom (and no serious institution of higher education cannot) but that does not have tenure should adopt such standards and procedures.

PROTECTING ACADEMIC FREEDOM THROUGH STRUCTURAL DEVICES

But difficult questions remain. Can employing only such a grievance model capture all the benefits of academic freedom that tenure does, and will it impose lower costs on the university? Here the assessment must be more hesitant. The spirit and influence of academic freedom is broader than a definition of rights and duties can capture. Moreover, what constitute costs and benefits in higher education are themselves contestable. Tenure contains other implicit protections of academic freedom, perhaps more substantive than procedural, that we have not yet weighed.

The effects of tenure on academic freedom are pervasive. A simple example is the status of any professors who serve on the appeals panel discussed above. In our hypothetical tenureless college, these professors would themselves not be tenured. Their continued employment would rest to some extent on some of the very institutional decision makers whose actions they are reviewing. They simply cannot enjoy the independence of decision making that tenured professors would be able to enjoy. This might make them unwilling to question the memory or veracity of an official in one case, or to stake out a broad reading of faculty prerogatives in another. Thus might academic freedom shrink over time both in practice and in theory. At a minimum, professors serving on such a committee must explicitly be protected against retaliation by the institution; perhaps longer-term contracts or even tenure would be desirable, to give them adequate independence.

Other pressures on academic freedom might require structural protections. In the absence of tenure, the process by which the institution decides not to renew a contract becomes more sensitive.

A familiar point concerns the length of an employment contract. In a tenure system, a probationary professor is subject to one deep and searching evaluation (often preceded by a briefer preliminary one). For professors on annual contracts, the yearly reviews must be more superficial. In such a setting, personal animosities and ephemeral disputes likely would play a larger role. It is doubtful that a professor would ignore the controversial character of his or her work if hostile reactions from evaluators could so swiftly and easily be translated into a nonretention decision. It is not surprising that most alternatives to tenure embrace long-term contracts (Trower 1996, Chait and Ford 1982). It is important for academic freedom that professional evaluations be long-term and serious. After all, these professional evaluations stand on the cusp of the paradox of academic freedom as a First Amendment right: The speaker can be penalized precisely for the content of his or her speech, but only on professional, educational grounds.

Who should conduct the evaluation? In the tenure system, the chief evaluators of a faculty member are disciplinary peers. Typically, a committee of the candidate's department or school studies her or his scholarship, solicits outside evaluations of writings, and reviews teaching and service to the institution. The committee then issues a report and recommendation that is voted on by the tenured members of the department or school. The resolution next proceeds through the governance hierarchy of the university, perhaps to an all-university committee, a provost or president, and the board of trustees. But the expectation is that administrators or trustees will reject a department's recommendation only for weighty institutional, educational reasons. Cases in which that expectation is frustrated are always controversial, and their notoriety can impose substantial institutional costs.

A criticism sometimes advanced against tenure draws attention to instances at poor or mediocre schools where tenure is granted without searching examination or outside review, and such criticism complains, understandably, that tenure prevents subsequent effective evaluation. But the problem there is with the evaluation procedures, not with tenure. Moreover, it is implausible that schools that cannot muster the effort to thoroughly evaluate a professor once before granting tenure will do so frequently before periodic contract extensions (Machulp 1964: 112).

This primary reliance on peer evaluation seems intrinsic to academic freedom. The 1915 Statement of the AAUP argues for academic freedom on the familiar ground that skilled scholarly inquiry will expand the boundaries of knowledge unless the passions and prejudices of ignorant trustees and administrators derail the process when a professor puts forward uncomfortable hypotheses (AAUP 1961: 860). There is no doubt that the AAUP founders had in mind protecting faculty evaluation from

trustees, regents, and their administrative agents. Even the Supreme Court has emphasized that limiting the evaluation of teaching to academics themselves exposes students to the methods of thought and diversity of views that will produce citizens capable of living in a pluralistic democracy.¹⁵ In short, scholarship and teaching cannot achieve their intellectual and educational goals unless faculty are judged on purely professional criteria by peers competent in and acculturated to the structures and values of the relevant discipline. (Of course, in practice, faculty rivalries, jealousies, and prejudices sometimes play an improper role even in peer review. But peers have a valid basis for evaluation that lay persons lack. It cannot be true that faculty evaluation will be purer if conducted more frequently and casually by nonexperts.)

This mutual dependence between academic freedom and peer review makes it imperative that faculty peers play a central role in any decision not to renew a professor's contract in a regime of no tenure. For the decision to be made primarily by a provost, department chair, or even a colleague from a different area of expertise greatly enhances the probability that the decision will be based on collateral factors — ranging from popularity with a benefactor to political affinity. At a minimum, the preliminary decision of an academic supervisor that a professor should not be retained — say, for unsatisfactory scholarly production — should be referred to an evaluation committee of peers in the professor's own field who should make some finding that, on professional grounds, the professor should not be retained. (As an aside, one should recognize that the professional independence of these peer evaluators might require institutional support to the same extent as the professors serving on the appeal panels. Indeed, their positions, in the absence of some extraordinary job guarantee, might be more tenuous than the members of the appeals panel, because they ought to be in the same discipline as the academic supervisor recommending nonretention and the faculty member who is the subject of the action.) Only the judgment of this peer committee, confirmed by the academic supervisor, should count as a final decision of nonretention. Moreover, it follows that the committee should apply fairly clear standards and give reasons for its decision.

There is irony in this conclusion: Few schools today operating under a tenure system are that careful in deciding not to reappoint junior faculty before tenure has been bestowed. The decision not to reappoint often is made informally by the dean or department head, and clear reasons rarely are forthcoming. Peer review has high administrative costs. But these summary procedures, even if they permit faulty judgments in particular cases, operate against the norm of intensive peer review in the

¹⁵ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 261-64 (1957) (Frankfurter, J., concurring).

tenure decision. In the absence of tenure, the nonretention process I recommend should be used for those who have passed an initial probationary period, say three years. By that time, junior faculty should have a record meriting careful review.

In summary, let's recap the recommended structural changes and the reasons justifying their adoption: First, faculty decision makers need enhanced job security to promote their independence from institutional preferences. Second, long-term contracts are desirable so that evaluation of professors is focused and intensive. Third, initiatives not to retain faculty at the conclusion of a contract should involve significant peer review before final decisions are made, so that the decisions will rest on appropriate professional criteria. These measures are necessary to preserve the significant aspects of academic freedom traditionally promoted by peer review.

COMPARISONS WITH TENURE

Compared with tenure, does a combination of (1) grievance procedures designed to deter and remedy violations of academic freedom and (2) structures for the employment relationship that protect peer review fully protect academic freedom at a lower institutional cost? The two parts of this question must be considered separately before they are answered together. In general, the answers will differ depending on how particular institutions define the goals and values of higher education.

First, it does seem that these measures would fully protect the familiar terrain of academic freedom. In some ways the protections sketched are even broader than tenure's. Every faculty member would have a contractual legal right to academic freedom, enforceable both through internal procedures and in court. Faculty without tenure would be entitled to specified peer review before a decision not to renew their contract could become final. An important benefit derived by uncoupling academic freedom from tenure would be to make explicit within an institution, and perhaps more generally within academia, the content of and the values behind academic freedom. Administrators and faculty alike would need to become more aware of the requirements for academic freedom; we might hope also that these educators would become more inspired by its spirit. Both establishing a definition for academic freedom in school regulations and deciding their application to particular cases should generate controversy. If the controversy is about the goals and values of the school or of higher education, it would be healthy. Of course, the efficacy of the approach depends on a school adopting a sufficiently robust understanding of academic freedom.

The chief area of concern with the described approach has to do with its effect on the distribution of power within the university. The American college legally is based on ultimate lay control through boards and administrative agents, as contrasted with the traditional universities of Europe, where legal authority resided primarily with the faculty. Lay control has long kept American institutions of higher education sensitive to the needs and preferences of the community, of the worlds of practice and commerce. The establishment of academic freedom and tenure, as the college developed into the university at the turn of this century, helped secure the intellectual mission of the university by giving senior faculty autonomy from lay people. Academic freedom and tenure can be described as substitutes for governing authority otherwise denied American professors.

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Without tenure, professors will be subject to greater control by administrators; indeed, such control, albeit generally for benign purposes of perceived institutional advancement, is the chief purpose of eliminating tenure. Difficult questions of academic freedom will arise when administrators direct professors to use standard textbooks or to avoid difficult student exercises. But more subtle and disturbing problems will stem from the changed culture of faculty life that could result from a greater dependence on continuing institutional favor. Will the desire to impress the dean lead a senior scholar to shape her or his inquiries or opinions in fashionable terms? Will the values of the educational marketplace that the school seeks better to serve displace even the cranky intellectual independence that nurtures the spirit of academic freedom? The answers to such questions need not be affirmative, but the risk that they might be should caution institutions that highly value faculty research and creativity against eliminating tenure. On the other hand, responsiveness to community

needs could better serve the mission of a school emphasizing training in advanced skills over research or liberal education, without destroying the ability of the faculty to speak authoritatively on controversial matters.

The benefits to academic freedom that will accrue by replacing tenure with the described procedures will vary depending on the mission of a particular school, and the administrative costs of adopting the procedures could be high, particularly the extensive procedures required for not renewing a contract. The administrative costs will not be as high, of course, as they would be in any individual case of dismissing a tenured professor. In that instance, a school must carry the burden of proving the

existence of incompetent or immoral behavior sufficiently serious to justify departure from settled expectations. Under the described procedures, the school would need to be prepared only to prove that it did not act for forbidden motives. Not only would the institution's range of action be broader, its burden of proof would be lighter, and procedural hurdles lower.

But if a school sought to intensively manage its faculty as "educational resources," the aggregate administrative costs could be very much higher than schools face now under the tenure system. The aggregate costs for dismissing tenured faculty probably are very low, because universities seek to dismiss tenured faculty only for very serious and repeated breaches of professional duty — in part because the effort to do so is so burdensome. Aggregate administrative costs for the procedures described could become very high, because more-extensive procedures would apply to termination of nontenured faculty, who currently enjoy only very limited protection under the tenure system. Moreover, the financial and human costs of terminating senior faculty would not be negligible. Not only should such cases be approved by a peer committee and, if appealed, by an appeals committee, but they predictably will often be accompanied by hard feelings, protests, and litigation.

Some schools will be willing to face these costs to achieve intensely desired restructuring. But many doubtless will find these procedures a mare's nest from which they will shy away. Studies of programs that periodically review tenured faculty suggest that institutions have little stomach for searching evaluation of professional performance that might lead to personnel action, both because of the time and effort required and because of fear of retaliation (Wesson and Johnson 1991). Similarly, current tenure rules do not require schools to take the narrow view they now do of cause justifying dismissal. Collegial institutions find aggressive moves against colleagues difficult. Thus, it is safe to predict that some schools would adopt a version of the described procedures to satisfy the demands of some constituent group, but barely change the frequency with which they seek to terminate long-term faculty.

CONCLUSION

Colleges and universities that do not maintain a tenure system can adopt procedures that will still provide legal and practical substance to academic freedom for their faculty. The explicit promise of academic freedom, coupled with the opportunity to bring complaints at reasonable cost before a

panel dominated by faculty, can give bite to core academic liberties not otherwise functionally protected.

On the other hand, it is more difficult without tenure to construct alternative procedures that ensure more subtle aspects of academic freedom. Tenure has preserved the preeminence of peer review in faculty evaluation, and that is a powerful safeguard for free inquiry and discussion, as well as a support for intellectual values in higher education. If tenure is put aside, new structures must be found to preserve peer review. But peer review is costly, and its preservation imposes a principled limit on the possibility of lowering the costs of intensively managing a faculty. ■

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